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JUDY MEAD

The Grand Juries

An American Inquisition

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The Grand Juries

An American Inquisition

BY JUDY MEAD

The federal grand jury, a body of twenty-three citizens who decide whether there is sufficient evidence to hold another citizen for trial, seems an unlikely weapon for the executive branch to use against dissent. Yet its purported investigatory powers, its protected secrecy, its appearance of independence, and its legal authority have made the grand jury one of the most powerful instruments for intelligence gathering and political disruption in use today.

Extraordinary Powers Of the Grand Jury

- A sitting grand jury has enormous legal powers.
- A federal prosecutor can subpoena anyone to appear before a grand jury anywhere without explanation.
- Subpoenas can be issued for any records, correspondence, documents, fingerprints, hair samples, handwriting exemplars, or other items of interest.¹
- There is no limit to the number of witnesses who can be called, and no restrictions on the nature or number of questions that can be put to them.
- There are no rules about the kinds of evidence that can be used—rumors, hearsay, results of illegal searches or warrantless wiretaps, irrelevant or prejudicial information—all of which are inadmissible in open court.²
- The government may use informants without exposing their identity, for their cover is protected by the grand jury's secrecy.
- The witness enters the chamber alone, loses the right to remain silent and has no right to have a lawyer present—rights the witness would have even in a police interrogation.
- No witness need be informed of the purpose of the

investigation, or even if he or she is its target; no witness has a right even to be warned that whatever he or she says could be used to bring charges against him or her.³

- A grant of partial immunity is often used to coerce testimony from a witness who invokes Fifth Amendment protection; a witness can be jailed without trial for contempt of court for up to eighteen months for continuing to assert that right after immunity is granted.

- Upon release, the same witness may be called before a new grand jury, asked the same questions, and jailed again for an additional eighteen months.

- Witnesses have no right to a transcript of even their own testimony; in fact, the prosecutor controls what, if anything, is recorded.⁴

In theory, some of these powers are subject to review by the courts; but in practice, the courts rubber stamp the prosecutor's whim.

The Change In The Grand Jury's Historical Role

Historically, the grand jury was to be a "people's panel" that would protect suspects against overreaching prosecutors and unwarranted prosecutions. The grand jury's primary function was to determine whether an indictment should be brought against the accused; it sat in judgment on the evidence presented by a prosecutor and acted as a check on his discretion. The eminent British legal theorist John Somers once wrote, "Grand juries are our only security, inasmuch as our lives cannot be drawn into jeopardy by all the malicious crafts of the Devil unless such a number of our honest countrymen shall be satisfied with the truth of the accusation."⁵ Thus the framers of the American Constitution included a grand jury indictment as a right guaranteed by the Fifth Amendment.

In addition to its charging function, the grand jury has been accruing an independent investigatory role. It constitutes, as the Supreme Court has said, "a grand inquest, the scope . . . [not limited narrowly] . . . by questions of propriety or forecasts of the probable results of the investigation."⁶ Its investigatory function was designed to insure that criminal ac-

tivities that the police might be reluctant to investigate—the misconduct of the rich or powerful—could be pursued by citizens meeting together. The Supreme Court has thus consistently refused to limit the grand jury's authority and powers, "because the task is to inquire into the existence of possible criminal conduct. . . . Its investigative powers are necessarily broad."⁷

It was the Justice Department of the Nixon administration that first turned the powers of this people's tribunal against political dissent and transformed the grand jury into an intelligence agency. Its motivation was similar to that which led the FBI to begin COINTELPRO. HUAC congressional investigations were no longer useful instruments to discredit political dissenters. The search for a weapon led the FBI to COINTELPRO and the Justice Department to the grand jury. The Nixon Justice Department recognized what had been true for decades: in operation, the grand jury was not so much a proud and independent people's panel as a pliant instrument of the prosecutor. As federal district court judge William Campbell concluded, "Today, [the grand jury] is but a convenient tool for the prosecutor. . . . Any experienced prosecutor will admit that he can indict anybody at anytime for almost anything." "Indeed, if one jury panel refuses to indict, a prosecutor may present the same evidence to another and another, until one agrees to return an indictment."

In 1969 and 1970, the Nixon Justice Department assembled the other elements necessary for a political grand jury network. Robert Mardian was named head of a revitalized Internal Security Division (ISD) in the Justice Department, which had been inactive since the McCarthy era. Its staff was increased from seven to sixty lawyers, and Mardian appointed Guy Goodwin, a forty-four year old prosecutor, to serve as head of a special litigation section within the ISD. Goodwin would serve as the field marshal, organizing a network of grand juries throughout the nation to locate "enemies" and gather evidence against them using grand jury investigations.

Forced Testimony

The last pieces were supplied by the Organized Crime Control Act of 1970, the Nixon administra-

tion's draconian police legislation. The act expanded the powers of federal grand juries, empowering the Justice Department to convene special investigative grand juries for eighteen months (with an extension of an additional eighteen months if desired) and by creating a more limited form of immunity for witnesses, called "use immunity."⁹ Under "forced immunity," which was first imported into federal criminal law in 1954, if a witness refuses to testify, claiming his or her Fifth Amendment right against self-incrimination, a prosecutor can force immunity upon the witness, and thus "waive" any Fifth Amendment right to silence. Before 1970, only "transactional immunity" was available and limited to specified offenses; generally those associated with organized crime. ("Transactional immunity" meant that a witness could not be prosecuted for anything related to the transactions about which he was forced to testify.) The new use immunity was not limited to specific crimes and provided protection only from evidence gained from the testimony; if "independent sources" provided other evidence against the witness, a prosecution could still be brought for the same transaction. A recalcitrant witness could now be given immunity and jailed for contempt if he or she refused to testify. If he or she chose to testify, he or she might yet be prosecuted with "independent sources of evidence."

The Nixon administration argued that the use-immunity provision of the 1970 Organized Crime Control Act was needed to aid grand jury investigations of organized crime, but forced immunity has proved to be of little use in such cases. Informers in crime syndicates are killed; thus subpoenaed gangsters are often grateful for the opportunity to prove their loyalty by spending several months in jail for contempt. Use immunity is occasionally useful when forced upon peripheral movement people to gather intelligence, but its true value is as a weapon to put uncooperative witnesses in jail and to frighten others who are politically involved.

Using forced immunity to punish witnesses who refuse to cooperate is a fairly recent prosecutorial tool, and was first developed in an attempt to break up an organized crime syndicate. In 1965, two relatively unknown assistant U.S. attorneys in Chicago, Sam Betar and David Schippers subpoenaed Sam Giancana, later famed as the Mafia contact in the CIA's assassination plots against Castro. Gian-

cana was granted forced immunity and jailed for contempt of court when he refused to testify. Betar said, "Giancana went to prison. And jailing him created a state of chaos and fear in the minds of associates. At first they had thought we were just trying to grab some headlines with the grand jury. But once the lesser lights learned that we'd found a way to put the head of the whole show in jail, they didn't know how to cope."¹⁰ Later Betar said, "I don't want to brag but I know we laid the groundwork for the way immunity provisions have been used in the past few years."¹¹

The Nixon Political Grand Juries

By 1970, all the pieces were in place; all that was required was a Justice Department willing to abuse its prosecutorial responsibility. The Nixon administration supplied that ingredient. From 1970 to 1973, the ISD conducted over 100 Guy Goodwin-supervised grand juries in eighty-four cities of thirty-six states, called some 1,000 to 2,000 witnesses by subpoena, and returned some 400 indictments.¹² The indictments were often merely *pro forma*, to cover the real investigative purposes of the grand juries. The normal conviction rate on grand jury indictments is 65 percent; less than 15 percent of the 400 ISD indictments were convictions or pleas to lesser charges.¹³ Targets included the Black Panther party, Vietnam Veterans against the War, Daniel Ellsberg, the Los Angeles antidraft movement, the Catholic Left, Mayday, the Puerto Rican independence movement, the American Indian Movement, the Movimiento Chicano, the women's movement, Irish unification supporters, labor unions, radical lawyers, and legal workers. Senator Edward Kennedy, reviewing the campaign in 1973, summarized the situation:

The use of "political" grand juries by the present administration is unprecedented. In a sense, of course, the practice is a throwback to the worst excesses of the legislative investigating committees of the 1950's. In this respect, the Internal Security Division of the Justice Department represents the Second Coming of Joe McCarthy and the House UnAmerican Activities committee. But the abuses

*of power of the Department's overzealous prosecutors do not even know the bounds of a Joe McCarthy, because their insidious contemporary activities are carried out in the dark and secret corners of the grand jury, free from public scrutiny*¹⁴

Intelligence Collection

The political grand juries used the pretense of investigating crimes to collect massive amounts of information on radicals throughout the country. One of the first major Guy Goodwin panels was convened in Tucson, Arizona, in October 1970. Goodwin subpoenaed five young activists from Venice, California, to testify about an alleged purchase of dynamite, *after* an indictment had already been returned against the man who allegedly bought the dynamite. The grand jury was used to develop in-depth information about radical activities in southern California. Goodwin asked questions such as "Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation and whom you visited during the time of your travels after you left your apartment in Ann Arbor, Michigan, in May of 1970."¹⁵ The five witnesses at first refused to testify and spent five months in jail for contempt of court. As they left the jail, Goodwin subpoenaed them again before a new grand jury. At that point, three faltered and testified.

Since their purpose is to collect information, political grand jury investigations are characterized by the sweeping questions asked regarding memberships in political organizations, names of other members, and the activities of the groups. Guy Goodwin has become famous for asking such questions as:

Seattle—May, 1972: "Tell the grand jury every place you have lived for the last two years prior to this date, advising the grand jury the period of time you lived at each location, with whom, if anyone, you resided, and what occupation or employment you had during each period.

Tucson—November, 1970: "I would like to ask at

this time if you have ever been a member of any of the following organizations, and if so, to tell the grand jury during what period of time you belonged to any of these organizations, with whom you associated in connection with your membership in any of these organizations, what activities you engaged in and what meetings you attended, giving the grand jury the dates and conversations which occurred: The Save Our Soldiers Association, the Coalition, the Los Angeles Reserve Association, the Peace and Freedom Party, the Humanistic and Educational Needs of the Academic Community Organization?"

*Detroit—June, 1971: "I would like to know if you were in Ann Arbor in the early part of February, 1971, and if you met any people in Ann Arbor who lived in Washington, or who you later found out lived in Washington; and if so, who were they, where did you meet, and what conversations were had?"*¹⁶

Goodwin subpoenaed Leslie Bacon from Washington, D.C., to testify before a Seattle grand jury as a material witness in the bombing of the nation's Capitol. Goodwin questioned her primarily about upcoming Mayday activities and her political activities in the previous two to three years. Ms. Bacon was later indicted on perjury and conspiracy in New York, but all charges were dropped by the government. Recently an FBI official, who had direct knowledge of the investigation, admitted, "We didn't know a damn thing. Leslie Bacon was the only thing we had and that was just a fishing expedition. She was called before a grand jury in Seattle because we thought we were more likely to get an indictment out there."¹⁷

The Grand Jury: Disrupting And Discrediting Political Organizations

Grand juries have also been used effectively to disrupt legitimate political activities, a sort of quasi-judicial COINTELPRO. For example, in 1972, the Vietnam Veterans against the War (VVAW) planned a series of demonstrations at the Democratic and

Republican political conventions, both scheduled to be held in Miami in July and August. Three days before the Democratic Convention opened, Guy Goodwin issued a first batch of twenty-three subpoenas to members of the VVAW, almost all either national, regional, state, or chapter organizers throughout the South. They were called to a grand jury in Tallahassee, 500 miles from Miami, on the very day their demonstration was scheduled to take place in Miami. Many were held a week, asked a few desultory questions and released. Five were jailed for up to forty days until their contempt citations were reversed. Eight veterans were ultimately indicted for conspiracy to engage in violence at the Republican convention in August. All defendants were acquitted by the trial jury on all counts. But VVAW's activities were totally disrupted, the organization severely weakened, and falsely branded as terrorist. On July 13, the Democratic convention passed a resolution condemning "this blatantly political abuse of the grand jury to intimidate and discredit a group whose opposition to the war has been particularly moving and effective."¹⁸ A recent Fifth Circuit Court decision in a related case said the VVAW grand jury proceedings were "part of an overall governmental tactic directed against disfavored persons and groups . . . to chill their expressions and associations."¹⁹

The use of the grand jury for political purposes, perfected during the Nixon administration, is described by Moore's *Federal Practice*:

[W]hen technical and theoretical distinctions are put aside, the true nature of the grand jury emerges—i.e., it is 'basically . . . a law enforcement agency.' Nowhere is this characterization more apt than in considering the use of grand jury proceedings by the Nixon Administration. In Nixon's war against the press, the intellectual community and the peace movement generally, the federal grand jury has become the battle-ground.²⁰

Recent Political Grand Juries

The grand jury continues as a major battleground. Although the use of political grand juries temporarily ceased during the Watergate investigation, there has been a resurgence of grand jury abuse under Attorney General Edward Levi.

When the Watergate scandal broke, disclosing illegalities committed by the highest officials of the Justice Department (Mitchell, Kleindienst, and Maridian), the Internal Security Division was disbanded and subsumed into the Criminal Division of the Justice Department. However, spokesmen for the Justice Department assert that the shift indicates no change in policy, and the new head of the ISD, Kevin Maroney, has confirmed that the ISD will continue to investigate "politically motivated crimes" and to use grand juries as it has in the past.²¹ Guy Goodwin remains an employee of the Criminal Division of the Justice Department.

The same pattern of abuse of grand juries as intelligence-gathering operations with COINTELPRO objectives has reemerged with the FBI giving more decisive direction. FBI agents increasingly threaten with grand jury subpoenas citizens who refuse to answer their questions. Subpoenas bear the signature of a U.S. attorney, but agents have filled in blank subpoenas when people would not talk freely, and in one known case, have subpoenaed a witness to appear before a nonexistent grand jury.²² Ralph Guy, a U.S. attorney in Detroit, has admitted that FBI agents are often sent out to question witnesses with grand jury subpoenas in their pockets.²³ Congress has repeatedly refused to delegate subpoena power to the FBI, feeling that no executive agency should possess what is essentially a judicial function.

In 1975, FBI agents descended upon the women's community in Lexington, Kentucky, and New Haven, Connecticut, allegedly pursuing a tip about Susan Saxe and Katharine Powers, wanted for a bank robbery in Boston. Hundreds of people were interviewed and asked detailed personal questions. Six refused to talk to the FBI in Lexington and were promptly subpoenaed before a grand jury purportedly investigating the "harboring of fugitives." FBI agents visited the families of some of the witnesses, urging them to pressure their children to cooperate with the bureau. In one case an eighty-four-year-old grandmother was visited by agents and told that her granddaughter was a lesbian. Six people were jailed for contempt after refusing to testify in Lexington. Five ultimately testified. The investigation was never pursued further, although one witness, Jill Raymond, spent fourteen months in the county jail. The exact pattern was repeated in New Haven where Ellen Grusec and Terry Turgeon refused to testify and spent a month in

prison. Both were then subpoenaed upon release and spent an additional six months in prison until the prosecutor withdrew their subpoenas. No indictments were handed down in either community; none of the women was charged or tried for any offense, except refusing to cooperate in the dragnet. For the witnesses the choices were all unpalatable. To cooperate was to assist the government's surveillance of the women's movement and protected political activity; to refuse was to face contempt-of-court citations and jail. In either case, the grand jury created suspicion and divisions among friends; it invaded individuals' privacy and disrupted their political activities.

In New York City and Puerto Rico, people identifiable in some way with the Puerto Rican independence movement, the Puerto Rican Socialist party or the Puerto Rican Nationalist party, have subpoenaed to grand jury investigations under the guise of "bombing and explosives" investigations. In New York City, the FBI questioned the Puerto Rican community extensively, threatening to subpoena those who wouldn't answer questions about political activities and associates dating back many years. The court accepted the government's proposition that merely being associated in the Puerto Rican Socialist party was sufficient basis to justify a subpoena. Citizens attending court hearings were photographed and became objects of later FBI interrogations. Two witnesses, Lureida Torres in New York City and Edgar Maury Santiago in Puerto Rico, have already been jailed. The grand jury subpoena, receiving almost automatic judicial approval, served to brand Puerto Rican activists and organizations with a terrorist label without a shred of evidence, just as grand jury subpoenas had earlier stigmatized members of the VVAW as violent in 1972.

The Need for Grand Jury Reform

To date, no restraints have been imposed upon the use of grand juries as a weapon against political dissent. In 1975, a second wave of "political" grand juries began, starting with the Lexington and New Haven probes mentioned above. Other political grand juries have recently been convened against labor

unions in Washington, D.C., and Florida, the American Indian movement at Wounded Knee, South Dakota, Oklahoma, and Iowa, and the Chicano movement in Colorado. There have been grand jury proceedings in the Symbionese Liberation Army/Patty Hearst case in Pennsylvania and in California, and in the filming of a movie made on Weather Underground in Los Angeles. In addition, radical defense lawyers and legal workers are now being subpoenaed in political cases across the country and asked for their records and/or information about their clients.¹⁰ Shirley Hufstедler, a judge on the Ninth Circuit Court of Appeals, observed recently:

Today, courts across this country are faced with an increasing flow of cases arising out of grand jury proceedings concerned with the possible punishment of political dissidents. It would be a cruel twist of history to allow the institution of the grand jury that was designed at least partially to protect political dissent to become an instrument of political suppression.¹¹

The "cruel twist" continues as yet unchecked.

Footnotes

1. *U.S. v. Dionisio*, 410 U.S. 1 (1973).
2. *Hearsay: Costello v. U.S.*, 350 U.S. 359 (1955). *Illegal searches: U.S. v. Calandra*, 94S.Ct.613 (1974). *Warrantless wiretap: U.S. v. Gelbard*, 408 U.S. 41 (1972).
3. *U.S. v. Mandujano*, 44 U.S.L.W. 4629, 0000 U.S. 0000, (May 19, 1976).
4. See generally *Memorandum on the Grand Jury*, prepared by the Office of Policy and Planning, U.S. Department of Justice, for the House Judiciary Committee, Subcommittee on Immigration, Citizenship and International Law, June 6, 1976, pp. 59-63.
5. "A Kind of Immunity That Leads to Jail: The New Grand Jury," by Paul Cowan, *New York Times* magazine, April 29, 1973. (Hereafter cited as Cowan article.)
6. *Blair v. U.S.*, 250 U.S. 273,282 (1919).
7. *Bronzburg v. Hayes*, 408 U.S. 665,668 (1972).
8. "Annals of Law: Taking the Fifth," by Richard Harris, *New Yorker*, April 19, 1976.
9. See generally *Kastigar v. U.S.*, 406 U.S. 44 (1972).
10. Cowan article.
11. Cowan article.
12. Cowan article.

13. Normal conviction rate: "The Organized Crime Control Act or Its Critics: Which Threatens Civil Liberties?" McClellan, 46 *Noirre Dame Lawyer*, 55, 60 (1970), cited in *The Grand Jury* by Leroy Clark (New York: Quadrangle, 1975), p. 50. ISD conviction rate: "Who Is Gay Goodwin and Why Are They Saying Those Terrible Things about Him?" by Lacey Fosburgh, *Juris Doctor*, January 1973.
14. The testimony of Senator Edward M. Kennedy, Hearings on the Fort Worth Five and Grand Jury Abuse before the House Judiciary Subcommittee No. 1, March 13, 1973.
15. *The Grand Jury*, pp. 47-48.
16. Grand Jury "Horror" Stories, compiled by Barry Winograd, March 15, 1973: Seattle, p. 6; Tucson, p. 4; Detroit, p. 6. Available from Coalition to End Grand Jury Abuse, 105 2nd St., N.E., Washington, D.C. 20002.
17. "Arrest in Capitol Bombing Called Fishing Expedition," by Timothy S. Robinson, *Washington Post*, Oct. 17, 1975.
18. Frank J. Donner and Richard I. Lavine, "Kangaroo Grand Juries," *The Nation*, Nov. 19, 1973.
19. *U.S. v. Briggs*, 514 F.2d 794, 805-806 (5th Circuit 1975).
20. 8 Moore's Federal Practice 6.02[1][b].
21. Cowan article.
22. In re Grand Jury Investigation, Des Moines, Iowa, in the matter of Martha Copleman, U.S. District Court, Southern District of Iowa, M-1-59.
23. "The FBI Connection," *Grand Jury Report*, published by Coalition to End Grand Jury Abuse (Winter 1976), p. 5.
24. "Grand Juries: A History of Repression," *Quash*, published by Grand Jury Project, 853 Broadway, New York City 10003, January 1976, pp. 13, 15.
25. Barry Winograd and Martin Tassler, *Trial*, January/February 1973, p. 16.

For More Information on Grand Juries:

- Clark, Leroy, *The Grand Jury*, New York: Quadrangle, 1975.
- Coalition to End Grand Jury Abuse, 105 2nd Street, N.E., Washington, D.C. 20002 (newsletter: *Grand Jury Report*, and various reprints available).
- Donner, Frank, and Lavine, Richard, "Kangaroo Grand Juries," *The Nation*, Nov. 19, 1973.
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- Harris, Richard, "Annals of Law: Taking the Fifth," *New Yorker*, April 5, 12, 19, 1976.
- Representation of Witnesses before Federal Grand Juries*, 2nd ed., London: Clark Boardman Co., 1976.

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